

Monograph 6

January-April 2010 Updates

Updates have been issued for Monograph 6. A summary of each update appears below. The updates have been integrated into the website version of the benchbook.

6.18 Motion to Suppress Confession Because of a *Miranda* Violation

- In *Maryland v Shatzer*, 559 US ___, ___ (2010), the United States Supreme Court held that a break in custody of 14 days ends the presumption of involuntariness established in *Edwards v Arizona*, 451 US 477 (1981), because that duration “provides plenty of time for the suspect to get reacclimated to his [or her] normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his [or her] prior custody.” The Court also held that when an individual is interrogated while in prison (for an unrelated crime), released back into the general prison population, then questioned again at a later time, the situation constitutes a break in custody for purposes of *Miranda v Arizona*, 384 US 436 (1966). *Shatzer, supra* at ___. According to the Court, “[w]ithout minimizing the harsh realities of incarceration, we think lawful imprisonment imposed upon conviction of a crime does not create the coercive pressures identified in *Miranda*.” *Shatzer, supra* at ___.

6.22 Motion to Disqualify Judge

- MCR 2.003 was amended effective November 25, 2009, concerning the grounds for judicial disqualification. ADM File No. 2009-04. Some ministerial and substantive changes have been made in this section to reflect the court rule amendment.

6.28 Motion to Suppress the Fruits of an Illegal Seizure of a Person

- In *People v Corr*, ___ Mich App ___, ___ (2010), the Court of Appeals found that “it was reasonable, for the officers['] safety as well [as] for [the] defendant[-passenger]’s safety, for the officers to command [the] defendant to remain in the vehicle while they completed their non-investigatory duties at the traffic stop, particularly considering that [the] defendant was intoxicated and aggressive toward the officers during the stop, bystanders had arrived on the scene, and the

weather conditions were dangerous.” The Court noted that under the circumstances, the officers needed to maintain control over the scene even though the driver of the car—the defendant’s son—had been arrested and secured in the police car. *Corr, supra* at ___, citing *Arizona v Lemon Johnson*, 555 US ___, ___ (2009). The Court concluded that “the officers’ commands to stay in the vehicle, which resulted in [the] defendant’s detention beyond the time of the driver’s arrest but before the officers had completed their duties at the scene, to be lawful.” *Corr, supra* at ___. The Court further held that “by ordering [the] defendant to stay in the vehicle, the officers were merely attempting to keep [the] defendant safe and maintain order and control over the scene so they could perform their non-investigatory police functions.” *Id.* at ___.

6.37 Motion to Suppress Evidence Seized Without a Search Warrant

- Where a police officer initiated a routine traffic stop of the defendant’s vehicle and lawfully arrested the passenger and secured him in a police car, and where the defendant had also been secured in a police car but was not under arrest at the time, a subsequent search of the defendant’s car incident to the passenger’s arrest was illegal. *People v Mungo (On Remand)*, ___ Mich App ___, ___ (2010).

Criminal Procedure Monograph 6: Pretrial Motions—Third Edition

September-December 2009 Updates

Updates have been issued for Criminal Procedure Monograph 6. A summary of each update appears below. The updates have been integrated into the website version of the monograph; consequently, some of the page numbers may have changed.

6.32 Motion in Limine—Impeachment of Defendant by His or Her Silence

The Michigan Supreme Court affirmed its decision in *People v Borgne*, 483 Mich 178 (2009) (the prosecutor’s references to the defendant’s post-arrest, post-*Miranda* silence violated *Doyle v Ohio*, 426 US 610 (1976), but did not amount to plain error requiring reversal). *People v Borgne*, ___ Mich ___ (2009). The Court also found that the defendant was unable to demonstrate that he was prejudiced by his attorney’s failure to object to the *Doyle* error; therefore, he was not entitled to reversal on the basis of ineffective assistance of counsel under *Strickland v Washington*, 466 US 668 (1984). *Borgne*, ___ Mich at ___.

6.36 Motion to Suppress Evidence Seized Pursuant to a Defective Search Warrant

Stale information cannot be used in making a probable cause determination. *United States v Frechette*, 583 F3d 374, 377 (CA 6, 2009). In determining whether information is stale, the court should consider the following factors: (1) the character of the crime (is it a chance encounter or recurring conduct?); (2) the criminal (is he or she “nomadic or entrenched?”); (3) the thing to be seized (is it “perishable and easily transferrable or of enduring utility to its holder?”); and (4) the place to be searched (is it a “mere criminal forum of convenience or [a] secure operational base?”). *Frechette, supra* at 378. In *Frechette, supra* at 378-379, the court applied the above-listed factors to conclude that 16-month-old evidence that the defendant subscribed to a child pornography website was not stale, because the crime of child pornography is not fleeting; the defendant lived in the same house for the time period at issue; child pornography images can have an infinite life span; and the place to be searched was the defendant’s home.

6.41 Motion to Dismiss—Denial of Right to Speedy Trial

Delays occasioned by the prosecution’s successful pursuit of an interlocutory appeal are “taken out of the calculation,” and therefore, are not attributable to either party when determining whether a defendant’s right to a speedy trial has been violated. *People v Waclawski*, ___ Mich App ___, ___ (2009), quoting *People v Missouri*, 100 Mich App 310, 321 (1980).

Criminal Procedure Monograph 6: Pretrial Motions—Third Edition

May-August 2009 Updates

Updates have been issued for Criminal Procedure Monograph 6. A summary of each update appears below. The updates have been integrated into the website version of the monograph; consequently, some of the page numbers may have changed.

6.19 Motion to Suppress Confession for Violation of Sixth Amendment Right to Counsel

Critical stages of the proceedings, in part, include the preliminary examination, a pretrial lineup, and the entry of a plea. *Duncan v State of Michigan*, 284 Mich App 246, 264 (2009).

A defendant’s Sixth Amendment right to counsel is protected by the “three layers of prophylaxis” established by the United States Supreme Court to ensure that a defendant’s Fifth Amendment rights are protected. *Montejo v Louisiana*, 556 US ___, ___ (2009).

(*Michigan v Jackson*, 475 US 625 (1986), was overruled by *Montejo v Louisiana*, 556 US ___, ___ (2009); therefore, references to *Michigan v Jackson* have been deleted from the text.)

6.21 Motion to Compel Discovery

A witness's informal and mutual agreement with law enforcement officials and the prosecution (that charges against the witness would be reduced in exchange for his testimony against the defendant) constituted evidence favorable to the defendant because of its impeachment value and should have been disclosed under *Brady v Maryland*, 373 US 83 (1963). *Akrawi v Booker*, 572 F3d 252, 263-264 (CA 6, 2009).

6.22 Motion to Disqualify Judge

Judicial disqualification on due process grounds may be warranted when an individual with an interest in the outcome of a case has contributed an extraordinary amount of money to the election campaign of one of the judges who will decide the case. *Caperton v AT Massey Coal Co, Inc*, 556 US ___, ___ (2009).

6.23 Motion to Dismiss Because of Double Jeopardy—Successive Prosecutions for the Same Offense

The United States and other countries are separate sovereigns; therefore, the Double Jeopardy Clause does not bar successive prosecutions for the same course of conduct. *United States v Studabaker*, 578 F3d 423, 430 (CA 6, 2009).

6.32 Motion in Limine—Impeachment of Defendant by His or Her Silence

People v Shafier, 277 Mich App 137 (2007), was reversed by *People v Shafier*, 483 Mich 205 (2009); therefore, the current reference to *Shafier* has been replaced. In *Shafier*, 483 Mich at 215-219, reversal was required because the defendant was prejudiced by the prosecutor's repeated references to the defendant's post-arrest, post-*Miranda* silence as evidence of the defendant's guilt, and to impeach the defendant's testimony that he was not guilty. Cf. *People v Borgne*, 483 Mich 178, 181 (2009), where the prosecution violated the defendant's due process rights by referring to his post-arrest, post-*Miranda* silence, but the violation did not amount to plain error requiring reversal.

6.39 Motion for Severance or Joinder of Multiple Charges Against a Single Defendant

Some of the text in this section has been deleted, as it relied on nonbinding cases and former versions of MCR 6.120. MCR 6.120(B) permits joinder if offenses are related, i.e., if they comprise the same conduct or transaction; a series of connected acts; or a series of acts constituting parts of a single scheme or plan. See *People v Williams*, 483 Mich 226, 233 n 5, 235 (2009), where joinder was appropriate because the defendant's two separate arrests were

“ongoing acts constituting parts of his overall scheme or plan to package cocaine for distribution.”

6.43 Motion to Dismiss—Violation of 180-Day Rule

The trial court erred in dismissing the pending charges against the defendant, because the prosecution commenced proceedings against the defendant within 180 days of receiving notice from the Department of Corrections that the defendant was incarcerated, thereby satisfying the requirements of MCL 780.131 (prisoner must be brought to trial within 180 days) and MCL 780.133 (dismissal required only if action has not been commenced within 180 days). *People v Davis*, 283 Mich App 737, 743 (2009).